No. 510

IN THE

Supreme Court of the United States

October Term 1948

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); UNIT 1, LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); JOSEPH KAHOLOKULA, SEICHI DOI, HARRIS YOSHIO NAGATA, BENJAMIN AWANA, FRANK MATSUI, GEORGE FERNANDEZ, ERNEST FERNANDEZ, CHARLES REVERA, JOHN DOE, MARY DOE, RICHARD DOE, *et al.*,

Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioners, the International Longshoremen's and Warehousemen's Union, an affiliated local and unit, trade unions in the Territory of Hawaii, and individual members and officers of these unions, pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered on September 27, 1948 (R. 113). A petition for rehearing, filed on November 15, 1948, within the time allowed therefore by the court, was denied on November 16, 1948 (R. 114).

The decree of the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the Supreme Court of the Territory of Hawaii entered on December 4, 1946, denying Petitioners' request for a perpetual writ of prohibition. (R. 71).[1]

This court's jurisdiction to grant this petition rests on the Act of June 25, 1948 (62 Stat. .....), U.S.C., Title 28, Section 1245, Subsection 1, which provides that cases in the courts of appeals may be reviewed by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

OPINIONS BELOW

The opinion of the Supreme Court of the Territory of Hawaii (R. 58) dismissing the writ is reported at 37 Haw. 404, and its opinion denying rehearing (R. 77) is reported in 37 Haw. 445. The opinion of the Circuit Court of Appeals (R. 106) is reported at 170 F. (2d) 183.

STATUTES INVOLVED

The statutes involved are the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. 101-115), the Sherman Act, Section 3 (26 Stat. 209, 15 U.S.C. 3), and the Clayton Act, Section 20 (38 Stat. 730, 738, 29 U.S.C. 52, and 53). These statutes are set forth in the Appendix to this petition.

QUESTION PRESENTED

Are territorial courts "courts of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the procedural and substantive provisions of that Act applicable in the Territory of Hawaii?

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[1] Rehearing denied by Supreme Court of Hawaii, January 23, 1947 (R. 77).

STATEMENT OF MATTER INVOLVED

Proceedings

Petitioners sought from the Supreme Court of the Territory of Hawaii a perpetual writ of prohibition against the respondent judge and sugar company. Petitioners asked that court to prohibit respondents from taking further action in, except to dismiss, an equity action in which the respondent judge, without complying with the provisions of the Norris-LaGuardia Act, issued an ex parte temporary restraining order which, among other restraints, prohibited picketing in company camps or towns used for residence purposes, and prohibited mass picketing defined as groups larger than three.

Contempt proceedings for alleged violations of this ex parte order were, at the time of the filing of the petition for writ of prohibition, pending against certain of the individual members and officers of the union, and such contempt proceedings are still pending.

The petition alleged that the Norris-LaGuardia Act limits the jurisdiction of the federally-created circuit courts in the Territory, and that the respondent judge was without jurisdiction to issue restraining orders or injunctions without complying with the terms of that Act. The petition further alleged that the record of the equity action made a part of the complaint showed on its face the failure of the respondent judge and sugar company to comply with the Norris-LaGuardia Act.

Facts

The respondent sugar company petitioned the respondent judge of the Circuit Court of the Second Judicial Circuit for injunctive relief against the petitioning union and its officers and members, prohibiting what the respondent company in its petition alleged to be unlawful acts of intimidation and coercion (R. 23).

The employees of the sugar company, members of the petitioning local union, were, at the time the respondent

company sought injunctive relief, on strike against the respondent company.

On motion of the respondent company (R. 33) on October 17, 1946, the respondent judge issued an ex parte temporary restraining order (R. 36). This order prohibited:

(a) interference with ingress and egress to the company's property located in Maui County,

(b) acts of coercion and intimidation,

(c) picketing of homes,

(d) mass picketing.

The respondent judge further limited peaceful picketing as follows:

> And In Furtherance Hereof, You are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets stationed at points of ingress and egress to the Petitioner's property, exclusive of the homes occupied by Petitioner's employees, said pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and without interfering with the Petitioner, its employees, or any other persons seeking to enter or leave the Petitioner's premises; said pickets being also enjoined from otherwise committing any of the acts hereinabove specified. Any persons engaging in picketing to the extent authorized above shall wear arm bands reading "Authorized Picket." (R. 38)

An order to show cause why an injunction should not be granted was issued by the respondent judge against Petitioners, returnable October 28, 1946 (R. 92).

The respondent judge granted the ex parte order limiting peaceful picketing to three because of the Territorial law prohibiting unlawful assemblies and riots.[2] The respondent judge in his oral decision stated:

[2] Sections 11570-11584, Revised Laws of Hawaii, 1945. This law, which provides that an assembly of three or more, if there is tumult and violence, is an unlawful assembly, was declared unconstitutional by a specially constituted court, on December 27, 1948, in *ILWU v. Ackerman*, Civil Nos. 828 and 836, in the Federal District Court for the District of Hawaii, ... F. Supp. .....

> The petition asks the Court to fix the number of pickets to be allowed. The Court, being mindful of our statutes on unlawful assembly and riots, and this motion for a temporary restraining order being directed for the sole purpose to prevent rioting and violence, the Court will follow the pattern set forth in the statute and permit but three pickets. (R. 91)

Before the return day, on October 23, 1946, the respondent company filed a motion for an order directing the county attorney to investigate violations of this ex parte order, alleged to have occurred on October 18, 1946. Pursuant to this motion, on October 23, the respondent judge ordered the county attorney to investigate alleged violations (R. 97). The order was subsequently amended, on November 4, to "suggest" rather than "order" that the county attorney investigate such alleged violations (R. 98).

Thereafter, the county attorney filed an information charging certain individuals with contempt of the ex parte order (R. 53).

On the filing of the petition, the Supreme Court of the Territory issued a temporary writ of prohibition against the respondents and an order to show cause why a perpetual writ should not be issued (R. 42).

The answer and return of the respondent judge (R. 45) admitted the existence of a labor dispute and non-compliance with the Norris-LaGuardia Act, but denied that the Norris-LaGuardia Act had any application to a circuit court of the Territory or a circuit court judge sitting in equity, or that the terms and conditions of said Act had any bearing on the propriety or validity of the respondent judge's acts in connection with the issuance of the ex parte restraining order.

The return of the respondent company (R. 55) admitted the existence of a labor dispute and that its petition did not comply with the provisions of the Norris-LaGuardia Act, but denied that the Act limited or in any way affected the jurisdiction of circuit courts of the Territory.

OPINION OF SUPREME COURT OF THE TERRITORY OF HAWAII

The Supreme Court of the Territory of Hawaii entered judgment dissolving the temporary writ, denying a perpetual writ and dismissing the petition. The court denied rehearing and reargument.

Petitioners argued that territorial circuit courts which were created by Congress and are subject to its plenary control at all times are courts of the United States as defined by the Act and that a circuit court judge has no jurisdiction to issue a restraining order in a case growing out of a labor dispute without complying with the provisions of that Act. Petitioners argued that the Act creates substantive rights for working people in the Territory, and that a circuit court judge has no power to restrain acts specifically made lawful by act of Congress. Petitioner argued that this court in *United States v. Hutcheson*, 312 U.S. 219, 61 S. Ct. 463, 85 L. ed. 788, has held that the Norris-LaGuardia Act is one of three interrelated acts and is amendatory of the Sherman and Clayton Acts both of which represent exercises of Congress' plenary power to legislate for the Territory of Hawaii, and that the amending Norris-LaGuardia Act must be given the same scope.

The court in its opinion by LeBaron, J., who, as a circuit court judge had reached the opposite conclusion,[3] in 1938, based its judgment dismissing the petition on the ground that:

> The meaning, then, of a "court of the United States", drawn from every part of the Norris-LaGuardia Act as well as from its caption "An Act * * * to define and limit the jurisdiction of courts sitting in equity * * *," is interpreted to be any court of the United States

[3] *Neves v. Reber* (Unreported), Eq. 3948, in the Circuit Court of the First Judicial Circuit. From 1938 to 1946, as a result of the decision by Judge LeBaron in this case, the application of the Norris-LaGuardia Act to territorial circuit courts was not questioned.

whose jurisdiction has been or may be conferred or defined or limited by Act of Congress under Article III of the Constitution and which court is one of first instance, sitting in an equity case involving or growing out of a labor dispute, with authority therein to issue restraining orders and injunctions reviewable in either the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia.

OPINION OF THE CIRCUIT COURT OF APPEALS

On appeal to the Circuit Court of Appeals, Petitioners assigned as error the making and entering of the judgment; the conclusion of the opinion that a circuit court of the Territory is not a court of the United States as defined by and within the meaning of the Norris-LaGuardia Act; the conclusion that the Act applies only to constitutional federal courts; the failure of the court to give the Norris-LaGuardia Act the same scope and coverage in the Territory as the Clayton and Sherman Acts which it amends; the narrow procedural construction given to the Act; and the court's failure to give effect to the public policy and to the substantive rights created by the Act.

The Circuit Court of Appeals based its decision on the same ground as the Supreme Court of the Territory—that the legislative definition contained in the Act includes only constitutional federal courts created under Article III of the Constitution. The court denied Petitioners' request for rehearing.

REASONS FOR GRANTING THE WRIT

I

The Circuit Court of Appeals, in affirming the judgment of the Supreme Court of the Territory of Hawaii holding the Norris-LaGuardia Act inapplicable to the federally created courts of the Territory of Hawaii, has decided a federal question of substance never determined by this

court. The effect of the decision is to deny to the three million residents of the territories and possessions of the United States the protection and benefits of a most important national labor law, and to becloud the rights of these persons under other interrelated federal laws. The method of statutory construction pursued and the narrow procedural approach adopted by the courts below in reaching this conclusion are not in accord with the manner in which this court has consistently held the Norris-LaGuardia Act must be interpreted in order to accomplish its purposes. The construction placed on this Act by the courts below permits courts created by Congress to flout the public policy of the United States declared in the Act, and results in giving to legislative courts created by Congress in the territories and possessions greater power in the issuance of injunctions in labor disputes than constitutional federal courts have.

II

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be decided by this court, and has decided this question in a manner in conflict with the decisions of this court. The Norris-LaGuardia Act, this court has held, amends the Clayton and Sherman Acts, *United States v. Hutcheson*, supra. Both the Sherman and Clayton Acts represent an exercise by Congress of its plenary power to legislate for the territories and possessions. Both Acts apply to territories and possessions in a wholly different way than to states. In respect to states, Congress has exercised its power to regulate interstate commerce. In respect to territories and possessions, Congress has exercised its power to legislate in the field of local law and has controlled all aspects of intra-territorial commerce except those specifically exempted. The substantive rights of labor which Congress carved out of the Sherman Act must be given the same scope in the

territories and possessions as the prohibitions against monopolies and restraints of trade. Since, as this court has held, the Norris-LaGuardia Act redefines the substantive rights created by the Clayton Act, the Norris-LaGuardia Act must be given the same scope, else the absurd result follows that an unamended Sherman Act and an unamended Clayton Act are in force in the territories and possessions. Both courts below ignored the complex problem presented for the first time of harmonizing and giving effect to these three interrelated acts in territories and possessions.

III

The courts below rested their decisions wholly on a technical construction of the legislative definition of "courts of the United States" contained in the Act. By judicial construction, they reduced the legislative definition, obviously framed to give the Act the widest possible scope, that is, all courts "whose jurisdiction has been or may be conferred or defined or limited by act of Congress" to "courts of the United States" mean "courts of the United States." The conclusion of the courts below would have greater validity and a sounder logical basis if the sometimes technically employed words "court of the United States" stood alone and undefined in the Act. In adopting this narrow technical construction, the courts below ignored the mandate of this court in *United States v. Hutcheson* that courts should interpret the Act to give hospitable scope to the intent of Congress, to effect its declared public policy, even if meticulous words are lacking, or even if Congress failed to express its will in words. By judicial construction of only one portion of the Act, the legislative definition, the courts enabled the territories and possessions to defy at will the public policy of the United States. The courts below failed to consider the legislative history; the interrelation of the Norris-LaGuardia Act with other federal laws; and the fact that Congress had consistently up to the time of the adoption of the

Norris-LaGuardia Act—in the Clayton Act and in the Railway Labor Act—and thereafter in the National Industrial Recovery Act, the Fair Labor Standards Act and the National Labor Relations Act—made all pieces of national labor legislation effective to the full extent of its power in the Territory of Hawaii, that is, in the field of intra-territorial commerce as well as in inter-territorial commerce between the Territory and the several states.

IV

This court has consistently held that the acts enumerated in Section 4 of the Norris-LaGuardia Act are legalized under all laws of the United States. It has held that the provisions in other sections of the bill in respect to the responsibility of unions and their officers and agents for illegal acts, the right to a jury trial in contempt cases, and other rights spelled out in the Act are substantive rights. *United States v. Hutcheson*, supra, *New Negro Alliance v. Sanitary Grocery Company*, 303 U.S. 552, 304 U.S. 542, 58 S. Ct. 703, 82 L. ed. 1012, *United Brotherhood of Carpenters, et al, v. United States, 330* U.S. *395*, 67 S. Ct. *775*, 91 L. ed. 973. The courts below refused to recognize the substantive character of these rights or to give effect to them.

Regardless of the application of the procedural provisions of the Norris-LaGuardia Act to territorial circuit courts, a circuit court judge, or even the territorial legislature whose power is limited to laws consistent with laws of the United States, locally applicable, cannot make illegal conduct which Congress has specifically legalized any more than such judges or legislature can immunize or make legal conduct made illegal in the Territory by the locally applicable Sherman and Clayton Acts. No court has power to enjoin legal conduct. Hence, the respondent judge was without jurisdiction to issue an ex parte order prohibiting peaceful picketing in company camps and so drastically limiting as to make meaningless the right of peaceful picketing

at the scene of the labor dispute. The courts below, therefore, should have granted the writ of prohibition prayed for.

V

The decision of the court below is in apparent conflict with the unanimous decision of a specially constituted three-judge federal court[4] in *ILWU v. Ackerman*, decided December 27, 1948, Civil Nos. 828 and 836, in the Federal District Court for the Territory of Hawaii, which considered the ex parte order issued by the respondent judge and strongly inferred the illegality of his action:

> After this occurrence picketing continued at Paia until the issuance by the Circuit Court of the Second Circuit of an ex parte temporary injunction in *Maui Agricultural Company, Limited v. International Longshoremen's and Warehousemen's Union, et al.*, Equity No. 325, limiting even peaceful picketing to three persons, the court stating in its opinion that picketing should be so restricted because of the territorial statute relating to unlawful assembly. See pp. 91-2 of the transcript of record in the appeal in the case of *International Longshoremen's Union v. Wirtz*, ... F. 2d ....., in the United States Court of Appeals for the Ninth Circuit. Logically, under the provisions of the statute as they will appear hereinafter, Judge Wirtz should have restricted picketing to two persons, not three. An application was made to the Supreme Court of the Territory for a writ of prohibition to issue against Judge Wirtz of the Circuit Court of the Second Circuit of the Territory of Hawaii to compel him to vacate the injunction. In *I.L.W.U., et al. v. Wirtz, et al.*, 37 Haw. 404, rehearing denied, Id. at p. 445, 21 the Supreme Court of Hawaii, holding that the Norris-LaGuardia Act, 29 U.S.C.A. Sections 101-115, was not applicable to the territorial courts of Hawaii, refused to issue a writ of prohibition against Judge Wirtz to compel him

[4] Biggs, Circuit Judge, Metzger, Chief Judge, and Harris, District Judge; opinion by Biggs, J., not yet reported.

> to vacate the ex parte injunction restricting picketing previously referred to. The decision of the Supreme Court of Hawaii was affirmed, as we have said, by the Court of Appeals for the Ninth Circuit. It should be noted that Judge Wirtz' decision constitutes an important contemporaneous construction of the application of the unlawful assembly and riot act.

In holding the unlawful assembly statute unconstitutional, the three-judge court further commented on the ex parte order issued by the respondent judge:

> Any gathering of pickets, or any picketing, however peaceful, might well "excite terror" in the mind of an employer of labor. Indeed the statute received such an interpretation in effect from the Circuit Court of the Second Circuit by Judge Wirtz, when he issued the ex parte injunction referred to above.

Although the case before the special three-judge court does not involve the Norris-LaGuardia Act, insofar as the decision casts doubt on the validity of the respondent judge's order, the decisions of that court and the court below are in apparent conflict.

VI

An ex parte restraining order prohibiting peaceful picketing in company camps used for residence purposes and so narrowly circumscribing the right of peaceful picketing elsewhere on the property of a large industrial agricultural company is surely void on its face. Since peaceful picketing engaged in singly or in concert is immunized and made legal by the Clayton and Norris-LaGuardia Acts, indeed, the Constitution itself, the refusal of the Supreme Court of the Territory to grant a writ of prohibition against proceedings for contempt for alleged violation of the order will cause Petitioners serious hardship and long continued deprivation of rights guaranteed by federal law and the Constitu-

tion. This court should intervene to prevent such flagrant deprivation of federal rights as Petitioners will suffer if they are forced to defend themselves against contempt—without a jury trial as guaranteed by the Norris-LaGuardia Act—for alleged violations of an order void on its face.

Respectfully submitted,

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CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Respondents.

BRIEF IN SUPPORT OF PETITION

QUESTION PRESENTED

Are territorial courts "courts of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the procedural and substantive provisions of that Act applicable in the Territory of Hawaii?

ARGUMENT

I

CIRCUIT COURTS OF THE TERRITORY OF HAWAII ARE SUBJECT TO THE PROVISIONS OF THE NORRIS-LAGUARDIA ACT BECAUSE THEY ARE COURTS WHOSE JURISDICTION IS CONFERRED, DEFINED AND LIMITED BY ACT OF CONGRESS.

A. The Legislative Definition

Section 1 of the Norris-LaGuardia Act conditions on strict conformity with the provisions of the Act and the public policy declared therein the existence of jurisdiction

of courts sitting in equity to issue restraining orders and injunctions in cases involving or growing out of labor disputes. It provides:[1]

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Congress placed its own construction on the phrase "court of the United States." By Section 3 it provided, "When used in this Act, and for the purposes of this Act,"

> The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

The legislative definition of the term "court of the United States" in Section 13 of the Norris-LaGuardia Act, if given its natural meaning, embraces any court which exists by virtue of the authority of the United States and whose jurisdiction has been or may be conferred *or* defined *or* limited by Act of Congress.

Circuit courts of the Territory were created and their jurisdiction both has been, and may be, conferred, *and* defined *and* limited by Act of Congress.

B. Application of Definition to Circuit Courts of the Territory

A review of the manner in which Congress has, in respect to the Territory of Hawaii, exercised the power vested in it by Article IV of the Constitution shows that Congress has delegated to local authorities, including local courts, some of its power, but that it has at all times reserved the right

[1] 47 Stat. 70, 29 U.S.C. 101.

to, and has, exercised its power directly in local affairs.[2]

By its Joint Resolution of July 7, 1898,[3] annexing the Hawaiian Islands to the United States, Congress accepted the cession to the United States by the Government of the Republic of Hawaii of "all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies."

In the period between July 7, 1898, and the enactment by Congress of the Organic Act of April 30, 1900, Congress exercised the sovereignty ceded to it by delegating to the existing officers of the Republic of Hawaii—civil, judicial and military—the government of the Islands, subject to direction by the President of the United States.

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[2] The Supreme Court of the territory in *Makainai v. Goo Wan Hoy*, 14 Haw. 607, 609 (1903), expressed better insight into the true status of the Territory in contrasts with a state than it shows here. In that case, it said:

> • • • The state, being an independent sovereignty within its sphere, makes its own constitution and laws, creates its own courts and fixes their jurisdiction; while a territory, being a political dependency under absolute control and dominion of Congress, its organic law is made by Congress and *its courts and their jurisdiction and procedure is defined by the same power.* (Italics ours.)

It should be further noted at the outset that the principle that an intention by Congress to supersede local law will not be presumed, relied on by the Territorial court (R. 58, 68), has no application to the question before the court because there is no local law dealing with the subject of the issuance of injunctions in labor disputes. By Section 9647, Revised Laws of Hawaii 1947, circuit court judges at chambers have power "to hear and determine all matters in equity." By Section 12401, circuit judges are given "full equity jurisdiction, according to the usage and practice of courts of equity in all cases where there is not a plain, adequate and complete remedy at law."

"Usages and practices of equity courts" is certainly a changing concept. All the series of cases legislatively disapproved by Congress in adopting the Norris-LaGuardia Act constitute equity practice. The respondents, because they disapprove of the purpose of the Norris-LaGuardia Act are struggling to maintain a concept of equity power which Congress outlawed because it found intolerable. Surely the respondent judge who exercises power delegated by Congress should not have power to flout the policy of Congress.

[3] Resolution No. 55 of July 7, 1898, 30 Stat. 750.

In this period between the adoption of the Organic Act and the Resolution of Annexation the courts of the Territory were courts of the United States exercising power by virtue of delegation of authority of Congress.

With the adoption of the Organic Act,[4] Congress conferred jurisdiction to exercise the judicial power of the Territory on the Supreme Court, circuit courts and on such inferior courts as the legislature might establish. Section 81 of the Organic Act[5] provided:

> That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the civil courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided.

Section 83 of the Organic Act[6] continued the laws of Hawaii relative to the Judicial Department, including civil and criminal procedures, except as amended by the Organic Act itself, and *subject to modification by Congress* or the Legislature.

Under no construction of the language of Section 81-83 of the Organic Act can any conclusion be reached other than that the Congress of the United States conferred jurisdiction on the Supreme and circuit courts of the Territory of Hawaii.

Nor did Congress stop with the conferring of jurisdiction. It defined and limited the general grant of jurisdiction to the Supreme and circuit courts of the Territory in several respects.

By Section 5 of the Organic Act,[7] Congress limited the

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[4] 31 Stat. 141, 48 U.S.C. 491 et seq.
[5] 48 U.S.C. 631.
[6] 48 U.S.C.A. 635.
[7] 48 U.S.C.A. 495.

power of the Legislature, as well as of the courts, by providing that the Constitution of the United States and *all laws of the United States not locally inapplicable* should have the same force and effect within the Territory as elsewhere in the United States.

By Section 6 of the Organic Act,[8] Congress continued in force only those laws of the Republic of Hawaii not inconsistent with the Constitution or laws of the United States or the Organic Act, and made these laws which were continued subject to repeal or amendment by it or by the Legislature of Hawaii.

By Section 55 of the Organic Act,[9] Congress placed residence limitations on the jurisdiction of the courts of the Territory—as well as the power of the legislature—to grant divorces.

By Section 80 of the Organic Act,[10] Congress empowered the President of the United States to nominate, by and with the advice and consent of the Senate, the Chief Justice and Justices of the Supreme Court and the judges of circuit courts. Congress likewise provided for the term of office of circuit court judges and provided that their salary should not be diminished during their term of office.

By Section 83 of the Organic Act,[11] Congress empowered circuit court judges to determine the times at which grand juries shall sit and to subpoena witnesses to appear before the grand jury.

By Section 84 of the Organic Act,[12] Congress prohibited judges of the Territory from sitting in cases in which a judge or his relatives were pecuniarily or otherwise interested, and delegated to the Legislature the power to add other causes of disqualification.

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[8] 48 U.S.C.A. 496.
[9] 48 U.S.C.A. 519.
[10] 48 U.S.C.A. 546.
[11] 48 U.S.C.A. 635.
[12] 48 U.S.C.A. 636.

By Section 86 of the Organic Act,[13] Congress granted to the Federal District Court of Hawaii the jurisdiction of district courts of the United States. In effect this divested the circuit and Supreme Courts of the Territory of jurisdiction previously exercised by them after the Resolution of Annexation, as for example jurisdiction in admiralty.[14]

By Section 92 of the Organic Act,[15] Congress fixed the annual salary of circuit court judges of the Territory of Hawaii and provided that they should be paid by the United States.

It is clear from these provisions of the Organic Act that from the outset circuit courts of the Territory were created, their jurisdiction was conferred, and their powers were defined and limited by act of Congress.

Congress in the Organic Act provided a continuing, ever existent standard for the exercise of power delegated by it to the Territorial legislature and courts—that is, consistency with the Constitution and laws of the United States, locally applicable.

C. Erroneous Construction of Definition by Circuit Court of Appeals.

Since Congress could have made the Act applicable to territorial courts, and since the definition does not on its face exclude them, the courts below found it necessary to construe the definition. In the course of the construction, they found an intention to exclude lurking in the definition.

1. Technical Construction of the Words "Court of the United States" Nullifies Legislative Definition.

The Circuit Court of Appeals found the intention to exclude in the use of the words "court of the United States" in the definition. It pointed out that this court has said that the words "court of the United States" are technical words and mean constitutional federal courts created under

[13] 48 U.S.C.A. 641-645.
[14] *Carter v. Second Judge*, 16 Haw. 242, 255.
[15] 48 U.S.C.A. 536, 539, 634.

Article III of the Constitution. It buttressed its conclusion by citing references to constitutional federal courts in the Senate Judiciary Committee report on the Bill (R. 106-109).

Technical words standing alone, or words to which a technical meaning has been ascribed by courts in the past, are generally construed in their established technical sense, unless a contrary intent is manifested by legislative definition or in the act as a whole. Here, the words do not stand alone. Petitioners argued that words "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress" are "an addition expressing a wider connotation."[16] The rationale of the court below that Congress by these words merely wished to extend the scope of the Act to constitutional courts created in the future seems inadequate. The court has reduced the definition to "court of the United States" means "court of the United States."

2. Legislative History Does Not Support Technical Construction.

The references in the Senate Report and in the Congressional debates to constitutional federal courts occur in contexts which make it clear that Congress was gravely concerned—one might almost say obsessed—with the question of its power. The Clayton Act had fared badly in the courts. Congress wanted to cure the evils about which labor had been complaining ever since the passage of the Sherman Act and its application by the courts to trade unions. Congress examined every Supreme Court decision affecting labor and every decision dealing with its power to determine public policy and to determine jurisdiction of inferior federal courts. To the best of its ability Congress tried to preclude the possibility that its labors would be destroyed by the courts or its will frustrated, as it had been in the Clayton Act.

It was the constitutional issue that focused the Congres-

[16] *Mookini v. United States*, 303 U.S. 20, 82 L. ed. 748.

sional drafters' attention, and the attention of the exponents of the bill, on inferior federal courts created under Article III of the Constitution. It has never even been suggested that legislative courts of the United States, as distinguished from constitutional courts, are not subject to plenary control by Congress.

Mr. LaGuardia indicated that Congress was primarily concerned with its power: "This bill does not take one iota of jurisdiction—*because we have not the power*—from state courts, and does not change any state law."[17] (Italics supplied.)

While this statement was made as an assurance to the states-righters, the legislative debates leave no doubt that the prevailing sentiment of Congress was that labor injunctions were evil, and that a majority would have taken jurisdiction from state courts if it had had the power.

There is not one word in the whole legislative history of the Act that indicates an intention to exercise less than the full power of Congress. There is not one word indicating an intention to exclude the federally-created courts of territories from the operation of the Act, nor to withhold from the 3,000,000 residents of territories the benefit of the rights created by the Act.

The full and natural meaning of the legislative definition encompasses the courts of territories which Congress created and whose judges are appointed by the President with the advice and consent of the Senate, and whose salaries are paid by Congress. The whole history of the Act makes it seem unlikely that Congress, in its vehement determination to eradicate the hated labor injunction, intended to permit any exception within the limits of its power.

3. Intent of Congress is Controlling, even if Territory Is Not Specifically Mentioned.

[17] *Congressional Record*, Vol. 75, Part 5, page 5478.

Even if the reference to inferior federal courts created under Article III of the Constitution in the Senate Report indicates that Congress was not thinking of, or considering, federally-created courts in the territories, the canon of construction of this Act laid down by this court—even if Congress had no consciousness of intention relating to these courts and omitted meticulous words except as to those courts which came most readily to mind—should be invoked to put into effect in the Territory of Hawaii the public policy of the United States.

The Circuit Court of Appeals cites the curiously long-uncodified definition of "court of the United States" set forth in 50 Stat. 753,[18] to indicate the kind of statute Congress might have drawn if it intended to include territorial courts within the purview of the legislative definition (R. 106, 111). If this statute, adopted in 1937, throws any light upon the question here presented, it is that there is no insurmountable obstacle, constitutional or verbal, to describing a territorial court as a "court of the United States." All that is necessary is to ascribe to the word "of" its customary sense of belonging, rather than considering the four words "of the United States" in a hyphenated, adjectival sense to create technical meaning. Any layman would do so.

4. Congress Regarded Appellate Procedure of Little Consequence.

The courts below also relied upon the procedural provisions of Sections 10 and 11 relating to appeals to support their exclusion of territorial courts from the operation of the Act.

We have the word of Senator Walsh of the Senate Judiciary Committee that Congress regarded these procedural appeal sections as inconsequential and the substantive rights as all important:

[18] (R. 106, 111) The provision of this section has now been incorporated in the new federal judicial code, Title 28, Judiciary and Judicial Procedure, Section 1252.

> We have endeavored in the framing of the bill to take care of the matter of appeals as best we possibly can; but no matter what we do about it, the appeal is no relief whatever, as the thing is all ended long before the appeal can be heard either one way or the other. Either the strike prevails or it does not prevail, *so the matter of appeal is of no particular consequence.*[19]

A failure or defect of a procedural character in respect to appeals cannot properly be used to diminish the scope of the Act and destroy substantive rights created by it. This court has always been alert to provide a forum to protect substantive rights. If these appellate provisions are inappropriate to territorial courts, the difficulty can be obviated by holding this section inapplicable to this situation[20] or this court can direct that the procedure in ordinary cases, i.e., an appeal from circuit courts to the territorial supreme court should govern, with the expedition features being given effect.

The "state and district" in Section 11 represent merely the procedural aspects of the substantive right to a jury trial in contempt cases. In the recent decision in the *Andres* case[21] the Supreme Court found no difficulty in carrying out a uniform policy in respect to death penalties in the Territorial District Court as elsewhere in federal district

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[19] *Congressional Record,* Vol. 75, Part 5, p. 4930.

[20] See Section 14, which provides: If any provision of this Act (Chapter) or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act (Chapter) and the application of such provisions to the other persons or circumstances shall not be affected thereby.

That these procedural sections offer no serious obstacle is illustrated by Section 1252 of the new federal code, which provides for direct appeal to this court from interlocutory or final judgments holding an act of Congress unconstitutional from "any court of record of . . . Hawaii." Courts of record include the Supreme Court and circuit courts, and probably, under this section as drawn, the Federal District Court for Hawaii.

[21] *Andres v. Territory of Hawaii,* 92 L. Ed. 790.

courts, even though the "meticulous" word "Territory" was omitted.

5. Fallacy of Logic of Circuit Court of Appeals.

The tortuous complexity of the rationale necessary to explain away the legislative definition impugns the validity of the conclusion. If Congress had been aware of, or intended, to adopt the technical, "well-defined" meaning of the words "court of the United States," which the court below relies on, obviously no definition was necessary. The definition is a declaration and a warning that what Congress gives it can take away.

Petitioners believe that primarily the erroneous conclusion of the courts below results from ripping the legislative definition from the context of the Act and considering it apart from the public policy and the other provisions of the Act.

II

THE HISTORY OF THE NORRIS-LA GUARDIA ACT AND ITS SPECIFIC PROVISIONS INDICATE THAT CONGRESS INTENDED THAT IT SHOULD BE GIVEN FULL FORCE WHEREVER CONGRESS HAD THE POWER TO MAKE IT EFFECTIVE.

A. Public Policy

The Circuit Court of Appeals, as well as the Supreme Court of Hawaii, relied almost wholly on the legislative definition contained in Section 13 (d) of the Act in arriving at the conclusion that circuit courts of Hawaii are not "courts of the United States," within the meaning of the Act and are not affected by either the procedural or substantive provisions of the Act. This narrow, procedural approach contravenes the public policy declared in the Act, and is not in accord with the way in which this Court has said the Act should be interpreted.[22]

[22] *United States v. Hutcheson,* 312 U.S. 219, 61 S. Ct. 463, 85 L. ed. 788. *New Negro Alliance v. Sanitary Grocery Company,* 303 U.S. 552, 304 U.S. 542, 58 S. Ct. 703, 82 L. Ed. 1012.

1. The Declaration of Policy.

Section 1 of the Act directs that no injunctive relief shall be granted "contrary to the public policy declared." Section 2 of the Act declares "the public policy of the United States" and contains the mandate that the Act shall be interpreted in the light of that policy.

In substance, the declaration recognizes the helplessness of the individual unorganized worker against the owners of property and the consequent necessity that he "have full freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization, or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In presenting the bill to the Senate, Senator Norris read each section and explained its purpose. He characterized Section 1 which says "no court of the United States shall have jurisdiction . . ." *as a preamble to the public policy.* After reading the declaration of policy he said:[23]

> If the act or any part of it should be involved in any litigation where an injunction was issued or asked for, the judge before whom such action was pending would be required to give full force and effect to the public policy thus declared by the act; and, *having in mind the public policy thus declared, he would be able to so construe the various provisions of the Act as to give full effect and validity to the public policy thus declared.* (Italics supplied.)

Here is the mandate: The public policy is the law. The other provisions of the Act are to be construed to give it full effect. Yet the courts below considered the public policy not at all.

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[23] *Congressional Record,* Vol. 75, Part 4, p. 4503.

Congress made the public policy positive substantive law. Senator Blaine, a drafter and supporter of the bill, and a member of a special sub-committee of the Senate Judiciary committee which considered the legislation and held hearings on it during the 70th, the 71st and the 72nd Congress, stated in the debates in the Senate:[24]

> When a declaration of public policy goes to the extent of declaring substantive law, then it ceases to be a mere declaration of public policy, but is the enactment of positive substantive law.

Both the Senate and House Reports on the Bill state that the declaration of public policy was drawn in the language of the Railway Labor Act which the Supreme Court had upheld and enforced in equity in *Texas and New Orleans Railroad Co. vs. Brotherhood of Railroad and Steamship Clerks,* 281 U.S. 548, 74 L. ed. 1034. The Senate report states specifically that the Norris-LaGuardia Act creates the same rights for all employees as was given to railroad employees.

The Railway Labor Act applies to intra-territorial commerce in the Territory. Under the *Texas and New Orleans* case all employees of railroad carriers in the Territory could enforce their substantive rights. It is Petitioners' contention that Congress intended by the Norris-LaGuardia Act to give the same substantive rights to other employees in the Territory.

This court, in the *Hutcheson* case, supra, indicated at Page 235 that the public policy should be made fully effective:

> To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex Printing Press Co. Case* still governs for purposes of a criminal prosecution is to say that that which on the equity side of

[24] *Congressional Record,* Vol. 75, Part 5, page 4681.

> the court is allowable conduct may in a criminal proceeding become the road to prison . . . That is not the way to read the will of Congress, particularly when expressed in a statute which, as we have already indicated is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking.

When Congress passes legislation to remedy evils "which have become intolerable" and are "violations of sacred rights of human liberty and freedom," and remind of involuntary servitude, can it be presumed that Congress intended to permit continued oppression by courts and employers in the territories over which it has plenary power?[25] It did not omit the Territory of Hawaii from the scope of any other national labor law passed prior to the Act, or subsequently.

2. Congress and Labor in the Territory of Hawaii.

Congress has perhaps most frequently exercised its power to legislate in the field of local law in respect to Hawaiian labor, and has shown a consistent awareness of the necessity for protective labor legislation in the Territory.

On annexation of the Territory, Congress immediately took cognizance of the conditions of labor, and in the Organic Act[26] relieved workers from the serfdom of indentured labor contracts.[27]

Before the passage of the Norris-LaGuardia Act, labor in the Territory organized or attempted to organize, and to strike. There were Territory-wide organizations and

[25] See *Page v. Burnstine,* 102 U.S. 664 where the court said: "The same considerations of public policy which would require the enforcement of such a statute . . . in the Circuit and District Courts of the United States . . . would suggest its application in the administration of justice in the courts of the district."

Territory-wide strikes even on plantations, but these organizations could not withstand the combined power of the employer and the Government.[28] This combined power was perhaps most frequently exercised in labor disputes on the criminal side of the court, with the employer-paid lawyers designated by the Attorney General serving as special prosecutors,[29] but the newspaper and court records indicate a considerable use of the labor injunction prior to the passage of the Act.[30]

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[26] Section 10, which provides in part: "That no suit or proceeding shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or services, nor shall any remedy exist or be enforced for breach of any such contract except in a civil suit or proceeding instituted solely to recover damages for such breach," and further declaring contracts for personal services for a definite term made after August 12, 1898, null and void.

[27] The Report of the Attorney General of the Territory in 1890 shows that 5,387 persons were convicted for violation of these contracts for the biennial period ending March 31, 1890.

[28] See *ILWU v. Ackerman,* ..... F. Supp. ....., decided December 27, 1948. The court in its opinion by Biggs, J., takes notice of and discusses much of this history, in holding criminal prosecutions against strikers were brought in bad faith during the 1946 sugar strike and the 1947 pineapple strike.

[29] *Ibid,* p. 17, court print.

[30] For example, during the 1909 Japanese strike, referred to in newspapers as "the higher wage conspiracy" the Pacific Commercial Advertiser for July 9, 1909 reports that Circuit Court Judge Robinson issued an injunction against the Nippu Jiji (a Japanese newspaper supporting the strikers) ordering it to put an end to articles that included threats of boycott or ostracism, and enjoining thirty-three strike leaders from committing any acts of violence and from picketing places where employees of the Oahu Sugar Company and other Japanese laborers frequented for the purpose of intimidating them. See also *Territory of Hawaii v. Soga,* 20 Haw. 71, sustaining a conviction for conspiracy against the leaders of the Higher Wage Consummation Association. The charge was concerting together "to do what plainly and directly tends to incite and occasion offense and to do what was obviously and directly injurious to another" by conspiring to prevent certain corporations owning sugar plantations in the County of Honolulu from carrying on their business and operating their plantations, and thereby impoverishing them. (The territorial conspiracy statute under which these strikers were convicted was declared unconstitutional on December 27, 1948, by the three-judge federal court in *ILWU v. Ackerman, supra.*)

Nor can it be urged, as the Circuit Court of Appeals does, that Congress was unaware of the conditions of labor in the Territory. At the time of the adoption of the Organic Act, it required the United States Commissioner of Labor Statistics to present to the Congress every five years reports on the commercial, industrial, social, educational, and sanitary conditions of the laboring classes.[31]

[31] 31 Stat. 155; 33 Stat. 164; 37 Stat. 737; 29 U.S.C. 7. The Third Report of the Commissioner of Labor on Hawaii, 1905, Page 141 described the violations of the rights of labor and the disregard of their civil rights:

> The old customs and the habit of regarding Japanese and other Orientals as people of inferior civil status as compared with whites still prevail in Hawaii and manifest themselves in a hundred unconscious acts on the part of the managers and overseers, who have never considered that in the strict letter of the law residents of a foreign country domiciled within our territories have the same rights to protection of person and property and to privacy and respect as ourselves. At the time of the Lahaina strike (late in May, 1905), militiamen and police went in squads to the rented quarters of the strikers in the town of Lahaina—not upon the plantation itself—entered without ceremony or shadow of legal right and roused the inmates, using persuasion that came but little short of force to get them out to a conference which the management desired to hold with the men and which they, in the exercise of their rights, declined to attend. One of the most liberal and progressive managers in the Islands spoke with lively resentment of the criticism made by a judge of an act of one of his overseers, who had without legal authority or warrant forced open the door of a house occupied by Puerto Rican laborers suspected of theft, dragged the occupants from their bed, and discovered stolen property in their possession.

Congress showed an awareness of the depressed conditions of labor in the Territory by extending to the Territory every act of national labor legislation, such as the Clayton Act (1912), the Railway Labor Act (1926), adopted from 1900 to 1932. The same Congress that adopted the Norris-LaGuardia Act extended Section 7 of the National Industrial Recovery Act (1933) to the Territory, and succeeding Congresses legislated for the Territory in the National Labor Relations Act (1935), the Fair Labor Standards Act

(1938), and the Labor Management Act (1947). These acts apply to the Territory in the broadest possible scope, and in a broader scope than they apply to the states. In the states, these acts affect only employers and employees engaged in interstate commerce; in the Territory, they affect employers and employees engaged in intra-territorial commerce as well, and thus cover every phase of employer-employee relationship in the Territory, except industries specifically and uniformly exempted from the coverage of the acts.

If the Norris-LaGuardia Act, which is an integral part of national labor policy, is held inapplicable in the Territory, the comprehensive scheme which Congress devised is destroyed.[32]

The *ex parte* order issued by the respondent judge, prohibiting picketing in company camps and towns used as residences and limiting picketing at points of ingress and egress to three (R. 38), reminds of the very worst features of the worst injunctions that gave rise to the demand for reform and that motivated Congress to adopt the Norris-LaGuardia Act.[33]

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[32] With the decision of the Territorial Supreme Court, that destruction began: In defiance of the public policy of the United States, territorial circuit court judges, in four strikes involving from two hundred workers to twenty thousand workers, and thousands of acres of plantation property and company towns, have issued sweeping ex parte injunctions restraining the approximately one hundred thousand members of an international union and all persons acting in concert with them, from mass picketing or congregating in crowds (usually specified as two or three) have been issued.

[33] Frankfurter and Greene, *The Labor Injunction*, passim. At pages 264-269, the injunction issued by Judge Benson Hough against the United Mine Workers in the 1927 strike is set forth in full as being typical of one of the worst restraining orders issued by federal courts. Judge Hough limited picket posts on or adjacent to the public highways leading to the mines to three persons at a post. Judge Hough expresses in words the psychology apparent in Judge Wirtz's order: "Persuasion in the presence of three or more persons congregated with the persuader is not peaceful persuasion, and is hereby prohibited."

The will of Congress and its public policy, are frustrated by the decisions of the courts below.

B. The Interrelation between the Norris-LaGuardia Act, and the Sherman and Clayton Acts, and the Creation of Substantive Rights.

The Circuit Court of Appeals misconstrued petitioners' contentions, in respect to the effect in the Territory of the interrelation between the Norris-LaGuardia Act and the Sherman and Clayton Acts, both of which apply to the Territory; and in respect to the effect in the Territory of the substantive rights created by the Clayton and Norris-LaGuardia Acts. Indeed, the court below seems to construe Section 20 of the Clayton acts as authorizing injunctive relief in federal district courts rather than as limiting such power (R. 106, 112). This was the judicial construction of the Clayton Act which the Norris-LaGuardia Act was designed to change.[34]

[34] This portion of the opinion discussing the Clayton Act is susceptible to the interpretation that the court is holding, the words, "courts of the United States" in Section 20 inapplicable to the Federal District Court for Hawaii. While petitioners agree that this would be the only construction that would support the theory that the Act applies only to constitutional federal courts, it is untenable because of the definition of commerce and of persons contained in Section One of the Act. The Clayton Act must confer jurisdiction on the Federal District Court for Hawaii to enforce the anti-trust provisions of the Clayton Act in the Territory. Two decisions of the Territorial Federal District Court, *Alesna v. Rice*, 69 F. Supp. 897, 74 F. Supp. 865, and *Hall v. Moore*, 72 F. Supp. 533, hold that the Norris-LaGuardia Act applies to the Federal District Court for Hawaii, but not to territorial courts. This holding creates a paradox which the Circuit Court of Appeals was possibly trying to avoid by excluding the Territory from the provisions of Section 20. For if the Norris-LaGuardia Act applies to the Federal District Court of the Territory—which is a legislative court of the United States created under Article IV of the Constitution—the territorial district court has upheld the conclusion of the Supreme Court of Hawaii and of the Circuit Court of Appeals, but has invalidated the basis of the decisions.

Petitioners argued before the courts below that the Sherham, Clayton and Norris-LaGuardia Acts must be read together, and since the two former acts are effective in the Territory, the Norris-LaGuardia Act must likewise be held to apply to and affect the Territory. When these laws are so read, petitioners contend that a conclusion that the procedural and substantive provisions of the Act apply to territorial courts, including the circuit courts, is inescapable. In the alternative, petitioners contended that even if the procedural provisions of the Act do not apply to territorial courts, the provisions creating substantive rights inure to persons in the Territory,[35] and consequently, no territorial court has jurisdiction to enjoin the exercise of these federal substantive rights. Both contentions go to the question of the jurisdiction of the respondent judge, for no judge has jurisdiction to enjoin lawful conduct.

The Sherman Act of July 2, 1890, was in force at the time of the annexation of the Republic of Hawaii to the United States. It specifically applied to Territories. When Congress provided in the Organic Act that all laws of the United States, not locally inapplicable, should be given effect in the Territory, and limited the legislative power to laws not inconsistent with laws of the U.S. locally applicable, the Sherman Act automatically became law in the Territory. The Sherman Act applied to commerce in and within Territories, and thus represented an exercise by Congress of its plenary power to legislate for territories.

When the Clayton Act was adopted on October 15, 1914, its provisions relating both to monopolies and conspiracies in restraint of trade and to labor's rights were respectively applicable to commerce in and within the Territory, and to all persons, associations and corporations in the Territory. Congress by section 20 of the Clayton Act sought to legalize, under all laws of the United States, acts which

[35] 29 U.S.C.52, 53.

courts had previously held to be illegal. Its failure is written in the pages of judicial history; its tragedy, in the lives of workers. Congress tried again.

Senator Wagner, on the Senate floor during debate, invoked this history to make clear the magnitude of what Congress was trying to do:[36]

> We thought we had made a real advance when we passed the Clayton Act, but the hopes which the enactment of that law engendered have been blasted. The adjustment we sought to make thereby has not been made. The friction has continued and intensified. Injunctions are still issued containing restraints which, in the opinion of one Justice of the Supreme Court, remind of involuntary servitude.
>
> Under the blighting effect of the law as it has developed, we have seen the entire coal industry suffer disorder, violence, disintegration. We have seen the federal courts converted into strike-breaking agencies. We have seen freedom of speech, freedom of association, even the freedom to cooperate in refraining from work smothered under the blanket of injunctions which now covers the Nation.
>
> What is our problem?
>
> It is far bigger than the mere setting down of rules of practice in certain cases that come before the federal courts.
>
> Our problem is no less than that of marking out the boundaries of governmental action in the contest and contact between labor and industry.

The primary objective of the Norris-LaGuardia Act, as stated by the Senate Committee, and as stated many times during the debates, was "to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second the right to advance the lawful objectives of the association."[37]

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[36] *Congressional Record*, Vol. 75, Part 5, p. 4915.

[37] *Senate Reports*, 72nd Congress, First Session, Vol. 1, Report No. 163, p. 10.

The Act accomplishes these purposes in two ways:

1. By the creation of substantive rights to engage in these activities free from fear of subsequent criminal prosecution under any law of the United States.
2. By the absolute prohibition against their restraint by courts of the United States.

What are the "immunized trade union activities"—the substantive rights guaranteed by Section 20 of the Clayton Act as amended by the Norris-LaGuardia Act—which shall not be considered or held to be violations of any law of the United States:

1. The right to be free from yellow-dog contracts which are made unenforceable and void as against public policy.
2. In any labor dispute, as broadly defined in the Act, to do singly and in concert all the acts specifically enumerated in Section 4, and the protection against responsibility for the illegal acts of others without proof of participation, the right to a jury trial in contempt cases, etc.

The intent of Congress to legalize the rights in Section 4 is beyond question. Senator Norris, in presenting the bill to the Senate, stated:

> Section 5 says that the doing of these acts shall not be held by a court to be a conspiracy. *In Section 4 we already say they are legal* and no injunction shall be issued against anyone, even though there are several of them who have agreed to unite in any one of them.

And after quoting with explanatory comments each of the "legal" provisions of Section 4:

> Is there anybody who objects to any one of those recitals? Is there any one of them that is unfair? This amendment simply provides that *two or more* laboring men who agree to do any one of the acts I have enumerated shall not be held to be guilty of a con-

> spiracy. What is wrong about that? I ask any fair-minded man on earth? In any other case except a case involving a labor dispute one would be laughed out of court if he tried to charge a conspiracy on evidence as to any of the acts enumerated in the provisions I have read. Such a charge would apply nowhere and never has been made, so far as I know, except against men who toil, and as a rule, against men who toil down in the bowels of the earth in the mines.

Senator Bratton asserted:

> The difference is that *the acts enumerated in section four* are perfectly legal.

Senator Norris replied:

> We have declared them to be so, although it ought not to be necessary to do so.[38]

To give effect to these substantive rights in the Territory of Hawaii, the immunized trade union activity must be given as broad a scope as the Sherman and Clayton Act out of which, as judicially construed, Congress carved them. It would not seriously be contended that the Legislature of the Territory of Hawaii can legalize the acts made criminal in the Sherman and Clayton Acts. Yet the result of the decision of the Circuit Court of Appeals and the Supreme Court of the Territory is to permit territorial circuit court judges by fiat to declare illegal and restrainable conduct that Congress has specifically declared legal.[39]

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[38] *Congressional Record*, Volume 75, Part 5, p. 4931. This reference includes statements of Senator Norris also.

[39] This situation is reminiscent of Governor Altgeld's classical description of labor injunctions contained in his biennial message to the Illinois Legislature in January, 1895:

> The judge issues an ukase which he calls an injunction, forbidding whatever he pleases and what the law does not forbid, and thus legislates for himself without limitation and makes things penal which the law does not make penal, makes other things punishable by imprisonment which at law are only punishable

If these substantive rights, as Petitioners contend, inure to trade unions and their members in the Territory of Hawaii, then an *ex parte* order prohibiting an International Union, a local, and a local unit, and all persons acting in concert with them from all picketing whatsoever in company towns and camps used for residence purposes, and prohibiting engaging in peaceful picketing in numbers larger than three, in an agricultural strike involving hundreds of employees, is clearly beyond the jurisdiction of the respondent judge.

In the years since the adoption of the Norris-LaGuardia Act this court has identified peaceful picketing with the right of free speech guaranteed by the First Amendment. To a considerable extent, the legalized conduct under the Clayton and Norris-LaGuardia Act and constitutional rights overlap and are co-extensive, but with this difference: Congress declared the hated labor injunction an inappropriate weapon in labor disputes and withdrew it entirely except in cases involving fraud or violence, and even in those instances, carefully controlled the methods of its use.

If the respondent judge has jurisdiction in an ex parte hearing to enter the order here attacked, a circuit court judge of the Territory can do without hearing, what neither the Congress of the United States nor any state legislature can do by law.

CONCLUSION

The Circuit Court of Appeals erred in affirming the judgment of the Supreme Court of the Territory of Hawaii, denying Petitioners a perpetual writ of prohibition, because

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by fine, and he deprives men of the right of trial by jury when the law guarantees this right, and he then enforces this ukase in a summary and arbitrary manner by imprisonment, throwing men into prison, not for violating a law, but for being guilty of contempt of court in disregarding one of those injunctions. . . . These injunctions are a very great convenience to corporations when they can be had for the asking by a corporation lawyer.

the respondent judge was without jurisdiction to punish for contempt of the ex parte restraining order issued without complying with the Norris-LaGuardia Act, or in the alternative, was without jurisdiction to restrain the Petitioners from exercising rights guaranteed by federal law.

Respectfully submitted,

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APPENDIX

THE NORRIS-LA GUARDIA ACT

Act of March 23, 1932, c. 90, 47 Stat. 70
29 U.S.C.A. § 101 et seq.

Sec. 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon,

the jurisdiction and authority of the courts of the United States are hereby enacted.

Sec. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of

any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

Sec. 6. No officer or members of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon

clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complain-

ant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or

with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the Circuit Court of Appeals for its review. Upon the filing of such record in the Circuit Court of Appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Sec. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or

disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Sec. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

Sec. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such

dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sec. 14. If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Sec. 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

THE SHERMAN ANTI-TRUST ACT

Act of July 2, 1890, c. 647, 26 Stat. 209.
15 U.S.C. 3

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such

combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE CLAYTON ACT

Act of Oct. 15, 1914, c. 323, 38 Stat. 730.
15 U.S.C. 12-27; 18 U.S.C. 412; 28 U.S.C. 381-383, 386-390a; 29 U.S.C. 52, 53.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor

shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.